

GPRS/UMTS networks. Similarly, M2Z expects to work with its technology partners to include its Wide Area Radios as an integrated part of the offering.

M2Z will work with its technology providers and its business partners to make its receiver units available for the public through normal distribution channels such as electronic retailers and local service partners. M2Z believes that the initial range of prices for its standalone “gateway” device will be under \$250 in the initial years and will rapidly decline with greater consumer adoption and the resulting scale economies provided by the opportunity to serve national markets.

IV. THE M2Z PROPOSAL WILL YIELD CONCRETE PUBLIC INTEREST BENEFITS AND TRANSFORM THE COMMUNICATIONS MARKETPLACE

M2Z’s broadband service has unique public interest characteristics – free nationwide service, filtering of obscene and indecent material, unprecedented construction benchmarks to ensure rapid deployment of a nationwide network, the commitment to build an interoperable and affordable broadband network for public safety agencies and first responders, and a voluntary 5% revenue-based spectrum usage fee payable annually to the U.S. Treasury. In addition to these specific public interest benefits, the proposed M2Z broadband network will promote competition, accelerate broadband deployment in low income, rural and high cost areas with zero reliance on USF support, and help ensure a seamless, interoperable broadband network for public safety agencies. The Commission’s grant of M2Z’s Application pursuant to Part 1.945 of its Rules would therefore be in the public interest.⁵⁵

A. The M2Z Proposal Contemplates Specific and Enforceable Public Interest Obligations

In exchange for the spectrum requested in this Application and under the conditions outlined herein, M2Z pledges to utilize the spectrum subject to specific and enforceable public interest commitments that will govern its conduct under the requested license.

Provision of Free and Broadband Data Services. First and foremost, M2Z will ensure a robust level of broadband service is provisioned, with asymmetric engineered data rates of at least 384 kbps down and 128 kbps up, free of airtime or service charges, to all U.S. residents. By contrast, dial-up

⁵⁵ See 47 C.F.R. §1.945(b).

Internet access, which according to recent reports currently serves at least 54 million Americans, is generally available up to only 56 kbps.⁵⁶ Thus, M2Z's National Broadband Radio Service will have data rates at least six times faster than a dial-up service.⁵⁷ In fact, M2Z's National Broadband Radio Service will provide connectivity that amply meets the Commission's definition of high speed broadband.⁵⁸

Specific Construction Benchmarks. Under the conditions of its proposed license, M2Z would be required to commence service within 24 months of a grant of Commission authorization, and comply with strict construction compliance benchmarks, rather than the more lenient "substantial service" standard applicable to other wireless carriers. M2Z will be required to construct sufficient base stations to cover 33% of the population within three years of license grant and commencement of operations, 66% of the population within five years, and 95% within ten years.⁵⁹ The 95% benchmark represents the minimum construction obligation that M2Z must meet as a condition of its license.⁶⁰ This kind of rapid build-out

⁵⁶ See Appendix 5, *supra* note 7, at 7-10.

⁵⁷ Our estimate of a connection speed that is six times faster is conservative. Because all 56K modems are asymmetric protocols, some bandwidth is permanently reserved for uploads. In addition, throughput is dependent on line conditions. The fastest connection possible on a 56K modem is 53 kbps, but many consumers experience rates as low as 33 kbps. See Indiana University, Knowledge Base, at <http://kb.iu.edu/data/agmb.html> ("The theoretical maximum of a 56K modem is actually 53 Kbps."). See also Argon Technologies, Frequently Asked Questions, at <http://www.argontech.net/faq.php> ("56K modems also require a clean, straight through telephone connection to the telephone company's central office switching center. Phone company line amplifiers that boost a telephone signal over a long distance, PBX switchboard systems, and other phone equipment alter the phone signal and force 56K modems to fall back to speeds of 33.6 Kbps and lower. So no 56K modem ever connects at 56K. Most 56K modem users seem to connect at speeds of 28-33 Kbps.").

⁵⁸ The Commission uses the terms "high speed" and "broadband" to refer to services that provide transmission rates more than 200 kbps in at least one direction. See *Local Telephone Competition and Broadband Reporting*, Report and Order, 19 FCC Rcd. 22340, at ¶ 3 n.7 (2004).

⁵⁹ Without limiting the generality of the coverage benchmarks proposed in this application, M2Z plans to deploy its network in unserved and underserved areas throughout the United States, including rural and insular areas and federally recognized tribal lands that are unserved by any telecommunications carrier or that have a telephone penetration rate of 70% or less. Cf. 47 C.F.R. § 1.2110(f)(3). Because M2Z is proposing that the requested spectrum be assigned without auction, the tribal land bidding credit provided for in Section 1.2110(f)(3) would of course be inapplicable; nonetheless, M2Z submits that tribal lands are among the areas that could benefit greatly from the National Broadband Radio Service that M2Z proposes. The limitation of coverage to 95% of the population is based upon the company's estimates of where backhaul infrastructure may not be available to interconnect with optical network facilities and therefore the rest of the Internet.

⁶⁰ We note that, as a general matter, a licensee governed by Part 27 of the Commission's Rules must demonstrate that it provides "service which is sound, favorable and substantially above a level of mediocre service which just might minimally warrant renewal" as both a build-out requirement and to receive a dispositive "renewal expectancy" in the event that a competing application is filed against its renewal application. See 47 C.F.R. §§ 27.14 (a)-(b). M2Z believes that "hard" population coverage benchmarks are much more aggressive than the substantial service test. Nevertheless, M2Z leaves it to the Commission's discretion whether the substantial service standard should apply to it.

and service deployment serves consumers and obviates any concerns about potential spectrum warehousing.

Mandatory Filtering of Indecent and Obscene Material. M2Z commits to mandatory filtering of indecent and obscene material for the National Broadband Radio Service. This will be accomplished through a compulsory setting on the service that will utilize state of the art filters, taking every reasonable and available step to block access to sites purveying pornographic, obscene or indecent material. Like the free service itself, M2Z's content filtering will be "always on." Moreover, National Broadband Radio Service customers will be unable to alter the filters as they constitute an essential element of that service. To accomplish these critical filtering functions, M2Z plans to route National Broadband Radio Service traffic through a set of servers that can examine the traffic flows for improper activity and restrict access as required. Thus, the nation's children — and their parents — will have free access to broadband that is not only very affordable but also family-friendly and free from pornographic and other indecent material. Adults who wish to access otherwise lawful material that is restricted by M2Z's National Broadband Radio Service may do so by enrolling in one of M2Z's Premium Service offerings. Adult consumers providing M2Z with appropriate proof that they are of the age of majority, for example through the use of a credit card, can subscribe to a premium product.⁶¹ A more detailed explanation of the filtering mechanism to be employed by the company is provided in Appendix 3.

Commitment to Public Safety and Interoperability. The United States does not have an interoperable public safety network capable of providing broadband services to first responders.⁶² Various public safety organizations have estimated that the costs of building out such a nationwide, interoperable network could be as much as \$18 billion.⁶³ The network proposed by M2Z can serve as a

⁶¹ Cf. 47 C.F.R. § 64.201(a)(2).

⁶² Cf. National Task Force on Interoperability, "Why Can't We Talk? Working Together to Bridge the Communications Gap to Save Lives: A Guide for Public Officials" at 5, 15 (February 2003), available at http://www.safecomprogram.gov/NR/rdonlyres/322B4367-265C-45FB-8EEA-BD0FEBDA95A8/0/Why_cant_we_talk_NTFI_Guide.pdf. ("Interoperability Guide").

⁶³ See *Report to Congress* at ¶ 25.

secondary interoperable broadband data network for public safety.⁶⁴ As part of its deployment, M2Z pledges that it will serve any federal, state, or municipal public safety organization willing to utilize NBRS, without limit to the number of devices on the network. The service will commence as soon as the company constructs its network and makes service generally available in the public safety agencies' service area.

As part of its public interest obligations and as more fully described in Appendix 4, M2Z proposes to provide each registered public safety user (*e.g.*, a police car equipped with a laptop) the ability to access service (384 kbps downstream; 128 kbps upstream) without a fee, at only the cost of the gateway device.⁶⁵ The single nationwide network proposed by M2Z guarantees interoperability across the United States. M2Z's network will also provide greater capacity and higher speeds than the systems that most public safety organizations are likely to be able to afford to construct themselves, and no recurring federal, state or local government expenditures will be required to make M2Z's state-of-the-art system available to every law enforcement agency, fire department, and ambulance service in the United States.⁶⁶

Moreover, public safety entities that are interested in additional features can obtain them by subscribing to service through M2Z's strategic partner, PacketHop, Inc.⁶⁷ PacketHop's technology will enable users, among other things, to obtain real-time multicast video, to perform resource tracking functions, and use multimedia instant messaging. Further, PacketHop will provide autonomous mesh networking that will extend the reach, utility and functions of the gateway device and will allow communication between devices even if network infrastructure is unavailable or compromised. The features and benefits of the PacketHop technology are explained more fully in Appendix 4.

⁶⁴ See *Report to Congress* at ¶ 45. Although not appropriate for all public safety needs, commercial technology can provide a viable solution for interoperability.

⁶⁵ See Appendix 4, M2Z's Proposal to Serve Public Safety Entities, attached hereto.

⁶⁶ M2Z's commitment extends to all public safety entities that would be eligible under 47 C.F.R. §§ 90.1203, 90.523.

⁶⁷ See www.packethop.com. On April 22, 2006 PacketHop's technology was demonstrated at the largest U.S. public safety and homeland security field exercise held at Long Beach, California. See PacketHop Press Release, "PacketHop Deploys World's-First Mobile Mesh Broadband 4.9 GHz Product for Public Safety," Apr. 24, 2006, available at http://www.packethop.com/news_events/press_releases/2006/042406.php.

The Commission has already noted that commercial networks may provide a viable solution for public safety users who require both interoperable and affordable services.⁶⁸ M2Z is committed to work with public safety officials to help make reliable and affordable interoperable services a reality.⁶⁹ The nation's public safety community – federal, state and municipal entities – will have free access to a fully interoperable nationwide broadband network which can be integrated to provide a scaleable, low cost, and highly efficient network for public safety and homeland security purposes.

Five Percent Revenue-Based Spectrum Usage Fee Payable to the U.S. Treasury. M2Z will also offer faster data rates, access to additional content and/or special service offerings on a subscription basis (“Premium Service”), and is voluntarily committing to pay to the U.S. Treasury in the form of a “usage” fee in an amount equal to five percent (5%) of the gross revenues derived from the Premium Service.⁷⁰ Consistent with Section 309(j), this usage fee will ensure “recovery for the public of a portion of the value of the public spectrum resource” and will avoid any unjust enrichment for M2Z.⁷¹

B. The M2Z Proposal Will Promote Greater Broadband Penetration and Economic Growth

Grant of M2Z's Application will help ensure substantially greater broadband penetration in the United States. Currently, there are as many as 128 million citizens of the United States who have no broadband or utilize dial-up Internet access.⁷² With the introduction of M2Z's service, these individuals will have access to always-on broadband service six times faster than today's dial-up Internet access. Thus, M2Z will increase both the reach and the availability of high-speed services. M2Z's ability to

⁶⁸ See *Report to Congress* at ¶¶ 45-47.

⁶⁹ To the extent safety officials require uninterrupted service, M2Z will work with them toward this end. To the extent the Commission believes it is necessary, M2Z will seek modification of its license after grant in order to make any changes necessary consistent with our discussions with the public safety community.

⁷⁰ Because M2Z is proposing a digital service with a business plan similar to the broadcast model, it submits that its position is analogous to digital television broadcasters, who are required to pay such a fee on their ancillary services pursuant to Section 336 of the Act. See 47 U.S.C. § 336(e). See also *Fees for Ancillary or Supplementary Use of Digital Television Spectrum Pursuant to Section 336(e)(1) of the Telecommunications Act of 1996*, Report and Order, 14 FCC Rcd. 3259 (1998) (“*Digital Broadcast Fee Order*”). M2Z will pay a fee on the revenues derived from its Premium Service equivalent to what the Commission has established for the “ancillary or supplemental” subscription services of digital broadcasters pursuant to Section 336. See *Digital Broadcast Fee Order* at ¶ 20.

⁷¹ See 47 U.S.C. § 309(j)(3)(C).

⁷² See *supra* note 11.

break down the current economic barrier associated with broadband will provide tangible benefits for consumers who will be able finally to obtain an uninterrupted high speed connection.

The increase in new broadband subscribers will likely benefit all subscribers, whether new or existing. As explained in the attached economic study of Drs. Rosston and Wallsten (Appendix 5), increased broadband penetration will benefit U.S. consumers in three ways. First, by expanding the availability of broadband, M2Z's proposal will allow more consumers to receive the benefit of broadband service.⁷³ Second, the price of existing broadband services should decline because of the availability of M2Z's service. This would benefit customers of existing broadband services to benefit from the availability of M2Z's service, even if they do not utilize M2Z's network.

Finally, increased broadband penetration should increase the value of high speed services to all consumers through direct and indirect network effects.⁷⁴ Direct network effects occur when a subscriber benefits from direct interaction with another subscriber and is directly made better off by having more subscribers with whom to interact.⁷⁵ Indirect network effects arise from the provision of additional goods and services, such as software, that become more prevalent as producers respond to the size of the network.⁷⁶ Therefore, increasing the number of subscribers through lower prices and increased availability of broadband service can lead to more investment in broadband applications because there is a larger base of customers for the application developers to target. More widespread and compelling broadband applications, in turn, will attract more subscribers to broadband. Thus the self-reinforcing network effects lead to increased economic benefits.⁷⁷

As a result, increasing the number of broadband subscribers could generate tremendous economic benefits. Drs. Rosston and Wallsten reviewed studies quantifying the economic benefits expected to result from universal broadband service, such as the service proposed by M2Z.⁷⁸ The consensus of these

⁷³ See Appendix 5 at 5.

⁷⁴ See *id.* at 6.

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ As explained in Appendix 5, direct and indirect network effects can have a major impact on the U.S. economy.

⁷⁸ See Appendix 5 at 10-11.

studies is that universal broadband service could yield economic benefits of several hundred billion dollars.⁷⁹ Another way of looking at the potential benefit from increased broadband penetration is its effect on productivity growth. It has been estimated that investments in information technology and high-speed telecom infrastructure “may be responsible for nearly one full percentage point of the annual increase in U.S. productivity since 1995 [through 2004].”⁸⁰ By any measure, the potential economic benefits from increased broadband penetration facilitated by M2Z’s proposal are very large.

C. The M2Z Proposal Will Promote Increased Competition

M2Z has outlined its numerous commitments herein. But it is additionally valuable to the public interest that M2Z will be a new entrant in the nascent broadband market and therefore will provide much needed competition to spur additional investment and innovation to this sector of the industry that is growing too slowly for the U.S. to keep up with its peers in the world economy.⁸¹ M2Z’s entry supports the Commission’s goal of ensuring that a vibrant and competitive broadband industry serves to provide consumers with the most affordable access to these services. Moreover, M2Z’s entry is consistent with the notion that intermodal forms of competition create substantial facilities-based competition.

As competition flourishes, traditional carriers will be forced to respond in ways that will enhance the broadband market. For example, M2Z’s data rates and filtered content may result in incumbents finding ways to present more innovative offerings to their customers. These events will all accrue to the benefit of the public. Similarly, M2Z will place real pricing pressure on current broadband providers. Indeed, lower prices from increased competition will make broadband affordable to more people while allowing existing subscribers to pay less than they do now. Reduced prices for existing subscribers do not immediately yield net economic benefits, as those subscribers already benefit from broadband

⁷⁹ See *id.* at 7-10.

⁸⁰ See *id.* at 3, citing to Thomas Hazlett et al., “Sending the Right Signals: Promoting Competition through Telecommunications Reform,” Analysis Group: Washington, DC (2004).

⁸¹ Currently, approximately 93.5% of broadband lines are either cable modem or asymmetric DSL. See *High Speed Services for Internet Access Report: Status as of June 2005* at 2 (released April 2006), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-264744A1.pdf.

services.⁸² Lower prices do, however, increase consumer surplus by transferring additional benefits from producers to consumers. Reduced prices that encourage additional households and individuals to subscribe yield both increased consumer welfare and net economic benefits.

Granting M2Z's Application will help the Commission successfully reach the goal of encouraging multiple broadband platforms,⁸³ will spur innovation, and will result in generally lower broadband prices and/or higher speeds. This is a regulatory triple crown. Best yet, these benefits may be especially pronounced in rural areas and for other under-served populations.

D. The M2Z Proposal Will Enhance Universal Service

Universal service is one of the largest programs overseen by the Commission and state regulatory commissions. Combined, the four universal service programs under the Commission's purview⁸⁴ spent approximately \$6.6 billion in 2005 and these expenditures are expected to increase over time.⁸⁵ Should broadband access eventually fall under the rubric of universal service, such expenditures may become even more daunting in scale and scope.⁸⁶ Expansion of the universal service definition to include broadband services is not mere speculation. Rather, it may be viewed as a natural outgrowth of the Telecommunications Act of 1996, which acknowledges that universal service is an evolving concept – meaning that the definition may be extended to support additional services.⁸⁷ It is also organically related to the advanced services mandate found in Section 706 of the 1996 Act.⁸⁸ In fact, recent bills introduced in Congress would expand universal service specifically for the deployment of broadband services, with

⁸² Economists often refer to net economic benefits as “total surplus.”

⁸³ “If we are successful in our efforts, consumers will have the opportunity to choose the technologies and services that best meet their individual needs. One thing is clear—when consumers have more options through competition, they reap the benefits—better services, greater innovation and lower prices.” Remarks of Commissioner Michael J. Copps, *supra* note 21, at 2.

⁸⁴ The four programs are high cost, low income, schools and libraries, and rural health care. These programs are discussed in detail in Appendix 5.

⁸⁵ See Appendix 5 at 14.

⁸⁶ See Appendix 5 at 16-17.

⁸⁷ Section 254(c)(1) of the Communications Act of 1934, 47 U.S.C §254(c)(1), sets forth the conditions under which the Joint Board should recommend to the Commission changes in the definition of “universal service.”

⁸⁸ See 47 U.S.C. § 157 nt, Pub. L. No. 104-104, § 706(a), 110 Stat. 153 (1996).

the expansion estimates in the range of several hundred million dollars annually.⁸⁹ The possible broadening of the definition of universal service to include broadband would come with the unavoidable necessity of higher universal service payments from all consumers to cover the new class of services.⁹⁰

M2Z's application and the free services it plans to provide will allow the realization of universal service goals for broadband without necessitating the growth of the universal service funding requirements, and thereby reduce the growing burden on the American consumer. The expert economists that have reviewed M2Z's proposal estimate that M2Z's network could result in \$8.4-\$20.5 billion in savings to American consumers over a 25 year period.⁹¹ M2Z's private sector-financed proposal provides the Commission with an immediate means for expanding universal access policies to advanced networks, without imposing new costs on the federal government or consumers.

M2Z does not express a judgment as to what policies the Commission, or Congress, should ultimately adopt with respect to the USF. M2Z is offering to build a nationwide broadband network through private financing while at the same time helping to resolve one of the most complex undertakings in telecommunications, which is to make access both more widely available and affordable.⁹² While the debate over whether and how the USF may be adapted to broadband services continues,⁹³ M2Z urges the

⁸⁹ The Boucher-Terry "Universal Service Reform Act of 2006," for example, includes broadband service in its definition of universal service. See Section 4(c), available at <http://www.house.gov/boucher/docs/USF%20Bill.PDF>. See also Universal Service for the 21st Century Act, S.1583, § 5 (2006) (adding broadband account to USF), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s1583is.txt.pdf.

⁹⁰ See Appendix 5 at 16-17.

⁹¹ See Appendix 5 at 23.

⁹² See Television Bureau of Advertising, "TV Basics: Television Households," available at http://www.tvb.org/rcentral/mediatrendstrack/tvbasics/02_TVHouseholds.asp (citing Nielsen Media Research). Commission estimates of telephone penetration in the U.S. are consistently in the range of 94%. See Industry Analysis and Technology Division, Wireline Competition Bureau, *Telephone Subscribership in the United States*, Table 1 (rel. Nov. 2005), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-262084A1.pdf. One of M2Z's goals is to rival broadcast television's penetration rate. However, due to the need to rely on interconnection with, and transport over, the PSTN, M2Z is constrained to build out its network only to points reached by the PSTN.

⁹³ See, e.g., S.1583 (the "Universal Service for the 21st Century Act," introduced in the Senate on July 29, 2005, would revise the current USF mechanism, *inter alia*, to support broadband deployment in unserved areas and expand the USF contribution base); S.284 (introduced by Senator Gordon Smith from Oregon on February 3, 2005 to change the distribution mechanism; introductory remarks to this bill note that the high cost program provides no support to 40 states and propose to create a new mechanism that would target the high cost fund at smaller geographic areas); *Comprehensive Review of Universal Service Fund Management, Administration and Oversight*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 20 FCC Rcd. 113084 (rel. June 14,

Commission to grant its Application so it may pursue a parallel commercial approach to bring about affordable and universally available broadband service throughout the country.

E. M2Z Will Not Be Unjustly Enriched

The Commission has a statutory mandate that it recover “*for the public . . . a portion of the value of the public spectrum resource . . .*”⁹⁴ That is exactly what M2Z’s proposal is designed to do. First, M2Z proposes to build a national network and provide *free* national broadband service in exchange for the right to use the 2155-2175 MHz spectrum.⁹⁵ By providing free access to the spectrum, M2Z will ensure that the American public maintains unfettered access to the 2155-2175 MHz band. The value of free access to the public is substantial. Conservatively, assuming that M2Z would be able to sell its basic broadband service at twelve dollars a month to one million subscribers, the public would receive \$144 million worth of service annually for free from M2Z in exchange for M2Z’s use of the 2155-2175 MHz spectrum.⁹⁶ In essence, consumers will directly recover the value of the spectrum because they will be allowed on the M2Z information highway without having to pay a toll.

In addition to the value that consumers will directly receive from M2Z’s provision of free broadband service, consumers will also indirectly benefit from M2Z’s pledge to make payments to the U.S. Treasury. As a fundamental condition for grant of its license, M2Z is volunteering to pay the U.S. Treasury a “usage” fee of five percent (5%) on the subscription services that it will offer. The Commission has recognized in other contexts that such usage fees can serve to compensate the public for

2005) (broadly seeking comment on the manner in which the USF is currently administered and proposals to increase efficiency and reduce errors and fraud); *Federal State Joint Board on Universal Service*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd. 24952 (2002) (proposing changes to the contribution method, including a proposal for a per-line or per-telephone number charge).

⁹⁴ See 47 U.S.C. §309(j)(3)(c) (emphasis added).

⁹⁵ The Commission has in the past looked at the value of services and assets that a potential spectrum user would contribute in order to ensure that the spectrum user would not receive a windfall from receiving its spectrum outside of an auction. In the 800 MHz re-banding proceeding, the Commission determined that it would credit Nextel with the value of the 800 MHz spectrum it was contributing, the costs Nextel incurred to reconfigure the 800 MHz band, and the costs Nextel incurred to clear the 1.9 GHz band at the end of the transition. These contributions by Nextel will be weighed against the estimated value of the 1.9 GHz it received. See *800 MHz Re-banding Order* at ¶ 212.

⁹⁶ One million subscribers a month would represent only a very small portion of the estimated 119 to 128 million Americans who either have no Internet access or only have dial-up Internet access. Further, the price of twelve dollars a month is also a conservative estimate falling between the price for dial-up access and lower speed DSL offerings.

use of valuable spectrum and prevent unjust enrichment by licensees.⁹⁷ As M2Z's business grows, the "spectrum use" fee could also generate a sizeable contribution to the U.S. Treasury.⁹⁸

Beyond these direct contributions that M2Z would make for a license to use the 2155-2175 MHz spectrum, M2Z's proposal would also generate substantial indirect contributions to the public for the use of the spectrum. As discussed above, by establishing a privately financed national wireless broadband network, M2Z's proposal is likely to generate \$8.4-\$20.5 billion in universal service funding savings to American consumers over a 25 year period.⁹⁹ In the aggregate, the savings that M2Z will pass on to the federal government can be expected to be far greater than the proceeds that could be realized from auctioning the 2155-2175 MHz spectrum.¹⁰⁰ In short, M2Z's proposal will handsomely compensate the public for licensing the 2155-2175 MHz spectrum to it, and M2Z will not be unjustly enriched by the grant of a license outside of the auction process.

F. The Commission Will Have Ample Jurisdiction To Enforce M2Z's Commitments

There is no risk that the commitments made by M2Z will prove illusory. M2Z will be subject to the Commission's jurisdiction and enforcement authority in two respects. First, M2Z will be subject to the enforcement provisions of Section 332, which apply to commercial mobile services.¹⁰¹ Second, by

⁹⁷ See *Digital Broadcast Fee Order* at ¶ 20 (1998) ("We will set the fee for feeable ancillary or supplementary services provided on the DTV bitstream at five percent of gross revenues received from these services. We believe that a fee of five percent of gross revenues fulfills our statutory obligations to impose a fee which recovers for the public some portion of the value of the spectrum, prevents the unjust enrichment of broadcasters providing feeable ancillary or supplementary services, and approximates, to the extent possible, the revenues that would have been received had the spectrum on which these services are provided been licensed through an auction. We also believe that a five percent fee will not dissuade broadcasters from using their DTV capacity to provide new and innovative services that can greatly benefit consumers.").

⁹⁸ With some important exceptions, spectrum auctions are generally considered the most efficient mechanism for assigning spectrum, and some also consider the monies they generate to the Treasury as a way of recognizing the value of the spectrum to the public. However, it is not clear that spectrum auctions provide the public a true picture of the value of the resource. For example, the PCS auctions have yielded nearly \$17 billion to the Treasury since 1993 while the cellular industry has grown to become a \$100 billion industry in that time frame. Assuming a 5% spectrum fee to the current level of the industry's revenues, the net present value of this fee would yield \$58-87 billion to the Treasury (assuming 3% and 7% discount rates per OMB guidelines). This return pales in comparison to the \$17 billion raised through the auction program.

⁹⁹ See Appendix 5 at 23. These benefits are inextricably linked to M2Z's commitment to forego universal service support.

¹⁰⁰ See Appendix 5 at 24.

¹⁰¹ See 47 U.S.C. § 332(c). M2Z expects that it would be regulated as a CMRS provider, *see* Appendix 2 at Condition 10(f), and therefore will be subject to CALEA, E911, and relevant reporting requirements to the extent

incorporating M2Z's commitments into the license, the Commission will have independent authority to enforce compliance. In the event of M2Z's failure to comply with any of the explicit voluntary conditions, the Commission will have the discretion to find that the license has been rendered null and void of its own terms, without the need to conduct a revocation hearing.¹⁰²

This authority gives the Commission ample tools to enforce M2Z's commitment to provide a valuable service to the public under aggressive build-out schedules that will require service to 33% of the population within just three years after license grant and commencement of operations. It can equally enforce M2Z's commitment to construct a system engineered to provide data rates of 384 kbps download and 128 kbps upload speeds, or the other public interest conditions in the license. These are not hortatory promises; they are obligations with regulatory teeth.

M2Z is confident that it will be able to deliver broadband service consistent with its build-out requirements and voluntary conditions of operation. In granting the application, the Commission will have facilitated the development of a new broadband service offering much more quickly than possible under any other path for proceeding in the 2155-2175 MHz band. If, however, M2Z fails to deliver on the conditions of its license, the Commission has ample enforcement authority to take the appropriate actions, including seeking to cancel M2Z's license and put the spectrum to another use.

Attached as Appendix 2, M2Z is submitting proposed conditions under which it must operate in order to maintain its license. These conditions cover the legal, public interest, and technical parameters that will govern M2Z's service. Each of these provisions may be enforced by the Commission if such a necessity arises. These commitments include:

these provisions are applicable to CMRS and M2Z's proposed service. In addition, M2Z anticipates that its Premium Services (for which there will be a consumer charge) would be subject to universal service contributions to the extent specified by the Commission in appropriate rulemaking proceedings, and subject to the demands of competitive parity with the high speed access offerings of telephone companies and cable operators. M2Z will work with the Commission to ensure that its service meets the relevant requirements for CMRS providers.

¹⁰² See, e.g., *ICO Global Comm'n (Holdings) LTD v. FCC*, 428 F.3d 264, 270 (D.C. Cir. 2005) (holding that Commission was not required to hold a hearing when a satellite station license was revoked for failing to meet a milestone – a condition of the license) and *In the Matter of Glendale Electronics, Inc., Regarding the License of SMR Station WNGQ365, Santiago Peak And Mount Lukens, California*, Memorandum Opinion and Order, 19 FCC Rcd. 2540, ¶10 (2004) (“a license that cancels for failure to satisfy a license condition is not revoked and does not trigger a hearing requirement”), *second petition for reconsideration denied in Order on Reconsideration*, 20 FCC Rcd. 4238 (2005).

- Construction of a system engineered to maintain broadband service at 384 kbps down and 128 kbps and provision of such service, *free* of airtime or service charges.
- Commencement of service within 24 months of a grant of Commission authorization.
- Compliance with deployment benchmarks that require M2Z to construct sufficient base stations to cover: (a) 33% of the U.S. population *by the third anniversary of commencement of operations*; (b) 66% of the U.S. population *by the fifth anniversary of commencement of operations*; and (c) 95% of the U.S. population *by the tenth anniversary of commencement of operations*.
- Filtering the NBRS in a manner that takes every reasonable and available step to block access to sites purveying pornographic, obscene or indecent material.
- Deployment of additional network facilities to serve any federal, state, or municipal public safety organization willing to utilize NBRS, without limit to the number of devices on the network.¹⁰³
- Payment to the U.S. Treasury of a “usage” fee equal to five percent (5%) of the gross revenues derived from M2Z’s Premium Service.
- Avoidance of all harmful interference to any and all Commission licensees.
- Compliance with the Commission’s relocation rules for entities currently operating in the 2155-2175 MHz band.

V. THE COMMISSION HAS AMPLE LEGAL AUTHORITY TO GRANT THIS APPLICATION AND LICENSE M2Z UNDER SECTION 1.945 OF THE COMMISSION’S RULES

The Commission’s grant of M2Z’s Application for a nationwide, exclusive license for the provision of free high-speed broadband service is well within the scope of the Commission’s plenary and specific statutory authority, consistent with the Commission’s public interest mandate, left intact by the savings clause of 47 U.S.C. §309(j)(6)(E), and consistent with the Commission’s actions in the recent *800 MHz Re-banding* and *Ancillary Terrestrial Component* proceedings.

Under 47 U.S.C. §309(j)(6)(E), the auction provision should not “be construed to relieve the Commission of the obligation in the public interest to continue to use . . . threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing

¹⁰³ The service will commence as soon as the company constructs its network and makes service generally available in the public safety agencies’ service area.

proceedings.”¹⁰⁴ This is precisely a case where the public interest requires the Commission to consider alternatives to auctions for assigning spectrum licenses.

In exchange for the grant of an exclusive, nationwide license, M2Z is proposing to commit to a number of important and enforceable public interest obligations, including nationwide broadband deployment, subject to specific, periodic benchmarks; the provision of a basic level of free broadband service to all citizens; filtering to prevent the exposure of children to indecent materials; features for interoperability among and access of citizens to public safety organizations; and the voluntary contribution of a “usage fee” to the U.S. Treasury in order to compensate the government (and by extension, the public) for the use of the spectrum resource requested herein.¹⁰⁵ Given its compelling proposal to dramatically alter the broadband future of the country, M2Z believes that the Commission should find the immediate grant of its license without conducting an auction to be in the public interest.

Moreover, no new service and licensing rules are required, as a legal or practical matter. A protracted rulemaking would only compound the multi-year delay in putting the spectrum to productive use. Importantly, a protracted rulemaking would erect unnecessary procedural hurdles that would rob 128 million U.S. consumers of quick access to the free uninterrupted broadband service that M2Z will provide.

A. The Commission’s Plenary Authority

The broad goals of the Communications Act of 1934, as amended (the “Act”) are stated as the obligation “to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide and worldwide wire and radio communication service with adequate facilities at reasonable charges. . . .”¹⁰⁶ To achieve these ends, the Act grants the Commission exclusive and expansive authority to regulate communications by radio as the public interest, convenience and necessity

¹⁰⁴ 47 U.S.C. §309(j)(6)(E).

¹⁰⁵ The public will also receive value in the form of the estimated \$260 million of savings that might otherwise be required from the USF to support infrastructure equivalent to that proposed by M2Z by the end of its ten year build-out period. *See* Appendix 5 at 21-22.

¹⁰⁶ *See* 47 U.S.C. § 151.

require. Among the specific grants of authority under the Act, the Commission is charged with “generally encourag[ing] the larger and more efficient use of radio in the public interest.”¹⁰⁷ The Commission is also authorized “to allocate electromagnetic spectrum so as to provide flexibility of use” provided that, *inter alia*, such allocation would not deter investment or technological development in communications.¹⁰⁸

The Courts have long noted the broad scope of the Commission’s powers under the Act. “Congress’ clear intent . . . was to confer upon the Commission sweeping authority to regulate in ‘a field of enterprise the dominant character of which was the rapid pace of its unfolding.’”¹⁰⁹ The “public interest” standard, which governs all Commission action, is “a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.”¹¹⁰ M2Z contends that these broad standards give the Commission sufficient authority to act favorably in this Application.¹¹¹

Importantly, Congress’ grant to the Commission of competitive bidding authority under Section 309(j) of the Act did not disturb the long-standing Commission authority to use different licensing schemes and threshold qualifications to *avoid* mutual exclusivity.¹¹² Section 309(j)(6)(E) explicitly states that the grant of competitive bidding authority does not “relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, *threshold qualifications, service regulations, and other means* in order to avoid mutual exclusivity in application and licensing

¹⁰⁷ See 47 U.S.C. § 303(g). The Commission is also charged with classifying stations and prescribing the services to be provided by each class, and by individual stations. See 47 U.S.C. §§ 303(a)-(c).

¹⁰⁸ See 47 U.S.C. § 303(y).

¹⁰⁹ See *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1423 (D.C. Cir. 1983), quoting *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 219 (1943).

¹¹⁰ See *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

¹¹¹ “Where do we go from here? The FCC Auctions and the Future of Radio Spectrum Management.”, Chapter 4, Congressional Budget Office, April 1997, available at <http://cbo.gov/showdoc.cfm?index=9&sequence=5>. Following the 1993 spectrum auction amendments to the Communications Act of 1934, Congress found that “the use of auctions to assign specific licenses does not exhaust the possibilities of market-based mechanisms for managing the spectrum.” *Id.*

¹¹² See 47 U.S.C. §309(j)(6)(A)-(B).

proceedings.”¹¹³ The courts have also interpreted the Act to provide the Commission great latitude in using different licensing schemes to avoid mutual exclusivity.¹¹⁴

Even though some have called for spectrum auctions as a way of supplementing the Federal Treasury, using a different licensing approach to avoid mutual exclusivity is consistent with the plain reading of the Act. In fact, the Act specifically prohibits the Commission from making license assignment decisions based on the expectation of Federal revenues from auctions.¹¹⁵ Rather, the Commission is tasked to safeguard the public interest and seek to promote various socioeconomic objectives, including the “development and rapid deployment of new technologies, products and services for the benefit of the public” and the promotion of “economic opportunity and competition” in general, and specifically for small businesses, residents of rural areas, and minority and female-owned businesses.¹¹⁶ So long as the public interest warrants, the Commission can impose licensing rules that avoid mutual exclusivity without conducting an auction, with the balance hanging on “[the] effectiveness of licensing mechanisms that avoid mutual exclusivity [and] the potential costs of any such change against the potential benefits.”¹¹⁷ Based on the numerous public interest benefits that will result from M2Z’s proposal, it is clear that such a balancing act unequivocally tips the scales in favor of granting this Application.

Thus, the Commission may significantly advance the public interest by granting M2Z’s Application pursuant to Section 1.945 of the Commission’s Rules, without opening the spectrum to competing applications and competitive bidding. The Commission’s flexibility to award spectrum

¹¹³ See 47 U.S.C. §309(j)(6)(E) (emphasis added).

¹¹⁴ See, e.g., *Rainbow Broadcasting Company v. FCC*, 949 F.2d 405 (D.C. Cir. 1991) (“*Rainbow Broadcasting Company*”) (upholding Commission policy allowing commercial and non-commercial licensees to swap frequencies by seeking amendment to the table of allotments); *Hispanic Information & Telecommunications Network, Inc. v. FCC*, 865 F.2d 1289, 1294 (D.C. Cir. 1989) (upholding an absolute licensing preference for local applicants, noting that Section 309(e) “does not preclude the Commission from establishing threshold standards to identify qualified applicants and excluding those applicants who plainly fail to meet the standards”). See also *Amendment of the Commission’s Space Station Licensing Rules and Policies*, Notice of Proposed Rulemaking and First Report and Order, 17 FCC Rcd. 3847, ¶ 63 (2002) (noting permissibility of “first come, first served” licensing schemes under *Ashbacker*).

¹¹⁵ 47 U.S.C. § 309(j)(7)(A).

¹¹⁶ 47 U.S.C. §§ 309(j)(3)(A)-(B).

¹¹⁷ See *Implementation of Section 309(j) and 337 of the Communications Act*, Memorandum Opinion & Order, 17 FCC Rcd. 7553, ¶ 14 (2002) (“*Auctions MO&O*”).

licenses by means other than auction when in the public interest, left intact by Section 309(j), is also embodied in the Commission's rules – “[a]n application will be entitled to comparative consideration with one or more conflicting applications *only* if the Commission determines that such comparative consideration will serve the public interest.”¹¹⁸

B. Prior Commission Action Supports the Grant of a License Without Holding an Auction

The grant of the requested license is also consistent with recent actions by the Commission, similarly dictated by the public interest. In its Order to restructure the 800 MHz band in order to improve public safety operations, the Commission permitted Nextel to relocate to the 1.9 GHz band without being subject to competing applications that would require an auction. In making its decision, the Commission first and foremost determined that the public interest necessitated the restructuring of the 800 MHz band. It also made the determination that the grant of an exclusive nationwide 10 MHz license to Nextel was a critical element in facilitating the restructuring of the 800 MHz band and the public safety operations therein. In making its decision to avoid mutually exclusive applications, the Commission explained that nothing in Section 309(j) required it to accept mutually exclusive applications that would trigger an auction in the first instance.¹¹⁹ Although the *800 MHz Re-banding Order* relied, in part, on the Commission's authority to modify licenses under Section 316 of the Act, it further stated: “[w]e also note that, as an alternative licensing approach toward the same end, we could have exercised our authority to grant rights to the ten megahertz of spectrum to Nextel as an initial license, without subjecting the spectrum to competitive bidding measures.”¹²⁰ The Commission found that eligibility for such an initial license would have been limited to Nextel, in order to address the “public interest imperatives” in resolving interference to public safety communications.¹²¹ The *800 MHz Re-banding Order*, therefore, stands for nothing less than the fact that the Commission has the authority to independently determine

¹¹⁸ See 47 C.F.R. § 27.321 (emphasis added).

¹¹⁹ See *800 MHz Re-banding Order* at ¶ 69. The Commission also noted that it had never proposed opening the spectrum in question (1910-1915 and 1995-2000 MHz) to competing applications. See *id.* at ¶ 71.

¹²⁰ *Id.* at ¶ 74.

¹²¹ *Id.*

that public interest demands support the grant of a spectrum license without accepting mutually exclusive applications.

Where, as here, the proposed service will both address critical public safety concerns and also bring about an abundance of other benefits, the Commission has broad authority to make similar licensing decisions in its discretion.¹²² For example, in another recent proceeding, the Commission allowed Mobile Satellite Service (“MSS”) licensees to obtain licenses to provide Ancillary Terrestrial Component (“ATC”) services without an initial licensing auction procedure, finding that “it would be technically less efficient” to allow new entrants for ATC services and that “there are spectrum efficiency benefits to dynamic allocation [that] can only be realized by” limiting ATC authorizations to the existing MSS licensees.¹²³ The Commission found the fact “that MSS operations have the potential ability to bring new technologies and services to consumers in rural areas” compelling enough to justify its decision not to accept terrestrial applications from other parties.¹²⁴

M2Z submits that licensing the 2155-2175 MHz band without auction is justified because by doing so the Commission will rapidly move the broadband market toward the goal of achieving universally available broadband in the United States. Moreover, just as in the *800 MHz Re-banding Order*, M2Z can meet a critical public need by burdening itself with obligations that will further the Commission’s goals.¹²⁵ Additionally, as in the *MSS/ATC Order*, the proposal before the Commission provides technologically efficient means of addressing the lack of ubiquitous, affordable broadband that

¹²² See, e.g., *id.* at ¶¶ 73-74.

¹²³ See *Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Band*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd. 1962, ¶ 228 (2003) (“*MSS/ATC Order*”).

¹²⁴ See *MSS/ATC Order* at ¶ 228. In an earlier proceeding, the Commission had granted waivers to Air-Ground Radiotelephone Service licensees to obtain then-unassigned control channels, to be used as additional communications channels, simply noting that the requested waivers would allow for more efficient use of the spectrum. *Claircom Licensee Corporation and GTE Airfone Incorporated Requests For Waivers of Air-Ground Radiotelephone Service Rules*, Order, 16 FCC Rcd. 17959, ¶ 4 (Wir. Tel. Bur. 2001). Indeed, the first commercial Air-Ground system was operated for nearly a decade under experimental authorization, without competition, before receiving regular authorization. *GTE Airfone Incorporated*, Memorandum Opinion and Order, 6 FCC Rcd. 4435, ¶ 2 (Mob. Ser. Div. 1991) (granting a regular Air-Ground license, noting that Airfone had been granted an experimental license in 1981 and commenced operations in 1983).

¹²⁵ Cf. *800 MHz Re-banding Order* at ¶ 68.

“can only be realized by” M2Z.¹²⁶ M2Z has proposed the imposition of specific, substantial public interest commitments as conditions for the proposed broadband service, and is financially able to deploy a nationwide broadband network without subscriber revenue. These circumstances support M2Z’s eligibility to receive an exclusive, nationwide 20 MHz block of spectrum.

C. The Commission May Grant M2Z Its License Without the Delay Associated with a Rulemaking

M2Z requests that the Commission accept the application for filing, consider public comments on the application, and grant M2Z the requested conditional license as expeditiously as possible, without conducting, or awaiting the conclusion of, a rulemaking to establish service and licensing rules for the 2155-2175 MHz band. M2Z submits that there is no legal or practical need for such a proceeding, and that the delays inevitably associated with a rulemaking would siphon off a portion of the benefits promised by M2Z’s plan.

As the Commission is well aware, absent M2Z’s proposal, there would be significant work still left to be done for this band. Indeed, the Commission has been working on revamping its usage of the 2155-2175 MHz spectrum band to provide AWS for approximately five years.¹²⁷ While the Commission has reallocated this spectrum to provide AWS¹²⁸ and established rules to clear incumbent operators,¹²⁹ no service rules or channelization plans have been proposed for the band.

In light of the lack of movement in this band, the Commission recently alluded to a tentative plan to conduct a rulemaking in this band.¹³⁰ Given the short time it would take under the M2Z proposal to provide free wireless broadband service to the public, the delay associated with a rulemaking is wholly unnecessary. This Application presents the Commission with an opportunity to quickly make a decision

¹²⁶ Cf. *MSS/ATC Order* at ¶228.

¹²⁷ See *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, Notice of Proposed Rule Making and Order, 16 FCC Rcd. 596, ¶ 1 (2001) and *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, Memorandum Opinion and Further Notice of Proposed Rule Making, 16 FCC Rcd. 16043, ¶ 2 (2001).

¹²⁸ See *AWS 8th R&O* at ¶ 9.

¹²⁹ See *AWS 9th R&O* at ¶ 1.

¹³⁰ See *AWS 9th R&O* at ¶ 63.

that will result in the 2155-2175 MHz band being rapidly transformed into a thoroughly useful and productive band. Thus, the Commission need not go through the additional steps of proposing rules, seeking comment and replies, evaluating the record, and producing an order (or perhaps a series of orders) to conclude its rulemaking functions for the 2155-2175 MHz band. These actions take valuable time which, in the end, could compound the delay for service in this band.

Unfortunately, such delays are not unprecedented. For the 1710-1755 MHz and 2110-2155 MHz AWS spectrum band (“*AWS I*”), for example, the time between issuing a notice of proposed rulemaking to establish rules for the band and the auction for the band was over three years.¹³¹ If the 2155-2175 MHz spectrum was to follow a similar trajectory, widespread use of the spectrum to provide advanced wireless services would be still years away.¹³² A separate proceeding will not provide any more detail or comment than that which the Commission will obtain through public comment on this Application. Indeed, conducting a rulemaking here would result in a serious disconnect between the pace of Commission actions and the urgency of the broadband penetration problem.

Time is of the essence. Taking action now that permits this spectrum to be commercially deployed is critical to expand broadband availability, provide relief to universal service funding mechanisms and exponentially increase U.S. productivity. The United States does not have the luxury of time in which to eliminate the persistent lag separating it from the “broadband pioneer” countries. The band has remained underused for years, and the Commission has in hand a proposal for jump-starting its use in the public interest. Importantly, the conduct of a rulemaking would delay beginning of M2Z’s proposed build-out. The benefits from broadband expansion estimated by Drs. Rosston and Wallsten are

¹³¹ The NPRM was issued in November 2002. See *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Notice of Proposed Rulemaking, 17 FCC Rcd. 24135 (2002). The auction is scheduled for June 29, 2006. See *1710-1755 and 2110-2155 MHz Auction Public Notice*.

¹³² While M2Z acknowledges that special circumstances surrounding government relocation may have resulted in a longer time period for the *AWS I* rulemaking, here there is no need for any delay.

heavily dependent on the swift timing of the expansion, and many of them may evaporate if licensing is delayed.¹³³

Moreover, a rulemaking is not legally necessary, and the commitments undertaken by M2Z obviate the policy goals that would be served by opening such a proceeding. Under Title III of The Communications Act, the Commission must place applications on public notice and may not grant them “earlier than 30 days” from the issuance of that notice.¹³⁴ If the Commission finds that grant of the application serves the public interest, convenience and necessity, it must grant the application.¹³⁵ As 47 U.S.C. § 309(j)(6)(E) makes clear, the Commission must also avoid mutual exclusivity by means of threshold qualifications and other means when doing so is in the public interest. Notably, the issuance of “service regulations” is identified as only one of multiple means for avoiding mutual exclusivity, showing that service rules are not a required path for the Commission. In short, there is no statutory bar to granting the application without conducting a rulemaking, and the statute also makes clear that “service regulations” are only one of many methods for avoiding mutual exclusivity when in the public interest.

In addition to the lack of a legal bar to moving forward quickly, there is no practical need to consider and adopt service rules in this instance as the commitments undertaken by M2Z obviate the policy needs that would be served by opening such a proceeding. The conditions that M2Z is proposing be imposed on its license include the mandate that it operate in a manner that avoids harmful interference to all other Commission licensees and strictly follow the Commission’s recently adopted relocation rules for current operations in the 2155-2175 MHz band. In addition, M2Z has already voluntarily committed to enforceable conditions to its license that impose public interest obligations far greater than would

¹³³ This is not an academic fear. Protracted rulemakings prior to licensing have in the past meant that a new technology is not given a timely and full opportunity to deliver its benefits to the consumers. The Mobile Satellite Service rulemaking of the 1990s is one case in point. See, e.g., *In re Application of Motorola Satellite Communications, Inc. for Authority to Construct, Launch, and Operate a Low Earth Orbit Satellite System in the 1616-1626.5 MHz Band*, Order and Authorization, 10 FCC Rcd. 2268, ¶ 1 (Intern. Bur. 1995) and *In re application of Mobile Communications Holdings, Inc.; For Authority To Construct, Launch, and Operate an Elliptical Low Earth Orbit Mobile Satellite System*, 12 FCC Rcd. 9663, ¶¶ 1, 5 (Intern. Bur. 1997) (both applicants applied in late 1990 to operate a low earth orbit satellite system and were finally granted authority in January 1995 and June 1997, respectively, after a rulemaking on low earth orbit satellites).

¹³⁴ 47 U.S.C. § 309(b). See also 47 C.F.R. § 1.945.

¹³⁵ See 47 U.S.C. § 309(a).

ordinarily be applied to comparable wireless service providers. Under these circumstances, the public interest would not be served by conducting a rulemaking, as M2Z has already dealt with the Commission's key policy concerns through its Application.

Thus, if the Commission determines that the public interest benefits from the proposed service justify avoiding mutual exclusivity, the Commission should not conduct a rulemaking.¹³⁶ Instead, it should examine the thorough record that will no doubt be compiled in response to M2Z's Application.

VI. THE COMMISSION SHOULD GRANT CERTAIN OTHER PROCEDURAL RELIEF NECESSARY FOR THE EXPEDITIOUS GRANT OF THIS APPLICATION

M2Z seeks a waiver of the electronic filing rules and the requirement of filing certain schedules to Form 601. M2Z also requests waiver of any other Commission rules to the extent necessary to allow processing and grant of this novel application. The enormous public interest benefits to flow from the grant of the Application constitute ample cause for such a waiver.

M2Z requests that the Commission waive Section 1.913(b) of its rules, which requires license applications to be filed electronically, the requirement of completing certain schedules to Form 601, and any other rules necessary to allow the Commission to process this application. Pursuant to Section 1.925(b)(3) of the Commission's Rules, the Commission may grant a request for waiver if it is shown that: (i) the underlying purpose of a rule would not be served by its application in a particular case; or (ii) in view of the unique or unusual factual circumstances of a given case, application of a rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.¹³⁷ Due to the distinctiveness of the Application, Rule 1.913(b) must be waived in order for the Commission to properly entertain M2Z's proposal. As explained below, M2Z submits that the circumstances of its Application are sufficiently unique to warrant waiver of Section 1.913(b) of the

¹³⁶ If, however, the Commission were to decide to conduct a rulemaking for the band, M2Z believes that only a very limited set of new rules would be warranted. In that event, the Commission should simply include the 2155-2175 MHz band in 47 C.F.R. § 27.5, set forth the requested license term for the band at 47 C.F.R. § 27.13, and create a new Subpart incorporating the public interest obligations set forth in this application.

¹³⁷ See 47 C.F.R. § 1.925(b)(3)(i)(ii).

Commission's Rules and any other rules necessary to permit the Commission to process this Application.¹³⁸

Because M2Z is filing an initial licensing application to provide wireless service, it is required to file an FCC Form 601 with its Application.¹³⁹ Section 1.913(b) of the Commission's Rules, however, requires electronic filing of all applications using FCC Form 601 and associated schedules.¹⁴⁰ A prerequisite for filing FCC Form 601 electronically is that an applicant must enter the appropriate Radio Service Code.¹⁴¹ Notably, the Commission's instructions for filing FCC Form 601 provides applicants with an exclusive list of Radio Service Codes that must be entered into Box 1 of the Form. Failure to include a Radio Service Code will result in dismissal of an application as the Radio Service Code is a mandatory field.¹⁴² Each Radio Service Code in turn is associated with a particular schedule that must be submitted with the FCC Form 601.¹⁴³

M2Z seeks waiver of Section 1.913(b) because it is unable to comply with the letter of the rule. Currently, there are no service rules for the 2155-2175 MHz band, and thus there are no Radio Service Codes associated with operations in the 2155-2175 MHz band. Electronic filing remains infeasible even though M2Z has chosen the "BR" code for BRS service to facilitate processing of the Application.¹⁴⁴ Moreover, while M2Z has made an effort to complete Schedule B to the Form, which is required of BRS applicants, many of the requests set forth in that Schedule are simply inapplicable here. M2Z's inability to properly complete an electronic FCC Form 601 or to identify with certainty and complete the relevant schedule is the basis for this requested waiver of Section 1.913(b) of the Commission's Rules. Instead of

¹³⁸ See 47 C.F.R. §§ 1.913(b).

¹³⁹ See *Biennial Regulatory Review Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97 and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services; Amendment of the Amateur Service Rules to Authorize Visiting Foreign Amateur Operators to Operate Stations in the United States*, Report and Order, 13 FCC Rcd. 21027, ¶ 10 (1998) ("ULS Order").

¹⁴⁰ See 47 C.F.R. § 1.913(b).

¹⁴¹ See FCC Form 601 Instructions at 7.

¹⁴² See *ULS Order* at ¶¶ 90-91.

¹⁴³ See FCC Form 601 Instructions at 7.

¹⁴⁴ We note, however, that M2Z's choice of the BR code was done for the sole purpose of facilitating the process by which this Application will be incorporated into the Commission's Universal Licensing Service. M2Z does not seek treatment as a BRS provider. Rather, the Application outlines specific conditions that will govern the operation of M2Z's proposed service.

an electronic filing, M2Z seeks to file FCC Form 601 manually and to attach a narrative describing the technical characteristics of the service in lieu of a schedule, together with a Schedule B that is complete to the extent possible.

Such a waiver is not without precedent. The Commission has granted waivers of Section 1.913(b) when a wireless applicant cannot file an application electronically due to its inability, through no fault of its own, to complete all the fields in a Commission form.¹⁴⁵ In the *Calcutt Order*, for example, the Commission stated that an applicant's inability to obtain a ULS password, which prevented it from filing its application electronically, constituted "unique and unusual circumstances" warranting a waiver of the Commission's electronic filing rule. The Commission reasoned that the applicant had no reasonable alternative but to file his application manually.¹⁴⁶

The *Calcutt* facts are relevant here. Just as in *Calcutt*, M2Z lacks information necessary to make its ULS filing (in this case it is the lack of a Radio Service Code). The case for waiver here, however, is even more compelling than in *Calcutt*. In *Calcutt*, the ULS password necessary to make the filing was not readily available because it was being withheld from the applicant. Having no other alternatives, *Calcutt* filed an application manually one day before its deadline. The circumstances underlying M2Z's Application go well beyond whether the required information is *readily* available; rather, a Radio Service Codes does not exist. Here, no passage of time will change the fact that M2Z cannot properly complete an electronic FCC Form 601 or identify the relevant schedule.¹⁴⁷

Consequently, M2Z has no reasonable alternative but to manually file the relevant form, substitute a narrative description for a technical schedule, and file a Schedule B that is complete to the extent possible. The unique and unusual circumstances surrounding this case warrant waiver of Section 1.913(b) of the Commission's Rules and associated schedule filing requirement.¹⁴⁸

¹⁴⁵ See *Applications to Transfer Control of Licenses from Robert F. Broz to William B. Calcutt*, Order, 20 FCC Rcd. 8848, ¶ 25 (2005) ("*Calcutt Order*").

¹⁴⁶ *Id.*

¹⁴⁷ See FCC Form 601, Main Form at 1

¹⁴⁸ See *Calcutt* at ¶ 25.

Indeed, the underlying purpose of Section 1.913(b) of the Commission's Rules would not be served by its strict application in this instance. The main purpose of the Commission's mandatory electronic filing requirement is to streamline wireless services applications in order to expedite new wireless services to the public.¹⁴⁹ An exacting application of Section 1.913(b) would effectively prohibit M2Z's filing and would present a barrier to the introduction of new services to the public. As such, application of Section 1.913(b) would frustrate, rather than promote, the purpose of the rule.

Waiver of these requirements also will serve the public interest by expediting M2Z's service to the public. Universal broadband access is a national priority because such services have proven to be a critical conduit for, *inter alia*, productivity, job growth, education, and health care services all over the world. Free access to M2Z's network will make broadband Internet access ubiquitously available in the United States in all areas including less wealthy and rural areas.

Moreover, M2Z's proposal goes beyond simply providing broadband access. It provides tangible, meaningful public interest benefits to all Americans. This Application also represents a partial solution to the vexing problem facing first responders throughout the nation – the unavailability of a nationwide interoperable broadband network. In addition, M2Z's Application to provide family-friendly and free broadband service for nearly all Americans will promote the public interest in a number of ways, including promoting the widespread availability of indecency filters, spurring competition in the provision of broadband, keeping the universal service mechanism strong by avoiding any government subsidies, and contributing regular voluntary payments to the U.S. Treasury.

For all the foregoing reasons, M2Z respectfully requests waiver of Sections 1.913(b) of the Commission's Rules, associated electronic filing and schedule filing requirements, and any other Commission Rules that would prevent the processing of this Application.¹⁵⁰ The unusual circumstances surrounding M2Z's proposed network require waiver of the subject rules. The requested waiver will also serve the public interest by providing near-ubiquitous broadband

¹⁴⁹ See *ULS Order* at ¶ 20.

¹⁵⁰ 47 C.F.R. §1.913(b).